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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*, *Petitioners*

vs.

CHERYL J. HOPWOOD, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should the federal judiciary discard the teaching of *Regents of the University of California v. Bakke*, and prohibit state institutions of higher learning from even *considering* race, among other factors, in individualized admissions decisions, despite the institutions' long-settled educational interest in promoting dialogue and learning by selecting a diverse student body with varied backgrounds and experiences?

2. When a State's officials determine that they have a sufficient evidentiary basis for concluding that remedial race-conscious action is needed at one of the State's graduate schools, which itself had practiced *de jure* discrimination in the past, and whose legacy of having done so continues to affect its ability to attract and educate the best students of all races, do the Fourteenth Amendment and principles of federalism permit the federal judiciary: (a) to insist that those officials disregard the additional current effects, on that graduate school's applicant pool, of *de jure* discrimination in the public education of Blacks and Mexican Americans in that State at the primary, secondary, and college levels, and (b) to demand that those officials heed only findings made by the State Legislature itself rather than, as state law permits, acting on findings made by the Governor and the State Higher Education Coordinating Board?

3. Are Texas higher education admissions officials, following *United States v. Fordice*, precluded from taking race into consideration even though a race-blind admissions process would predictably recreate a system that is effectively segregated, with almost no minorities at the State's flagship law school and almost no white students at the law school that the State created to avoid integration?

4. Is Title VI of the Civil Rights Act of 1964, enacted under the Spending Clause of Article I, capable of abrogating a State's Eleventh Amendment immunity from suit in federal court without its consent, in light of *Seminole Tribe of Florida v. Florida?*

5. May a federal court, consistent with *Carey v. Piphus*, impose a presumption of compensatory damages for plaintiffs who complain of the process that was applied to them, but who have not shown any likelihood that they would have received a different result under a constitutionally flawless process?

6. May a federal court, consistent with Article III, award prospective relief against a State and its officials regarding a law school admissions policy, when the effects of that policy are not before the court and the "case" or "controversy" requirement is not met by any showing of actual harm the litigants would be likely to suffer in the future without such prospective relief?

PARTIES TO THE PROCEEDING

The petitioners (defendants-appellees in the courts below) are:

The State of Texas
The University of Texas Board of Regents
Bernard Rapoport, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert J. Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Martha E. Smiley, and Mario E. Ramirez, in their official capacities as members of the University of Texas Board of Regents
The University of Texas at Austin
Robert M. Berdahl, in his official capacity as President of the University of Texas at Austin
The University of Texas School of Law
Mark G. Yudof, in his official capacity as Dean of the University of Texas School of Law
Stanley M. Johanson, in his official capacity as Professor of Law at the University of Texas School of Law

The respondents (plaintiffs-appellants in the courts below) are:

Cheryl J. Hopwood
Douglas W. Carvell
Kenneth R. Elliott
David A. Rogers

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INTRODUCTION

In the decision below, the Court of Appeals for the Fifth Circuit held that an institution of higher learning, the University of Texas School of Law, is prohibited from considering race in any manner in its admissions processes. This decision is the first of its kind by any federal court. In promulgating its far-reaching rule, the court of appeals took it upon itself to overrule, anticipatorily, the holding of a five-Justice majority in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and called into question the permissibility of considering race in admissions programs in public colleges, universities, and professional schools throughout the country. The national significance of the decision is obvious. Moreover, even apart from the equal protection issue, this case presents fundamental questions of state sovereignty and federal judicial power.

There is more than a touch of irony that this case should arise out of the same institution, the University of Texas School of Law, that provided the basis for this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), overturning the official state ban on the admission of Blacks to the School of Law. There is also a harsh irony that this case should arise from the State of Texas. The undisputed record shows that Texas students applying to the challenged 1992 incoming class were largely the products of a public school system that was still under court supervision for failing effectively to remedy unconstitutional *de jure* segregation. Not contested below, but unmentioned in the Fifth Circuit's opinion, is the effective resegregation of the University of Texas School of Law that would result if the Fifth Circuit's decision were left intact. The School of Law is the State's flagship institution, charged with training the leaders of the State and beyond. The Fifth Circuit's decision would have produced, in a State whose population approaches forty percent Blacks and Mexican Americans, a 1992 incoming class with at most a handful of Blacks and Mexican Americans, out of more than five hundred students.

The central question before this Court is whether the Constitution compels this result.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, filed March 18, 1996 (Appendix A), is to be reported at 78 F.3d 932. The opinion of the United States District Court for the Western District of Texas, dated August 19, 1994 (Appendix B), is reported at 861 F. Supp. 551. On April 4, 1996, the Court of Appeals entered an order denying rehearing en banc and indicating that a dissent from the denial of rehearing en banc was forthcoming. Appendix C. On April 19, 1996, the Court of Appeals, pursuant to FED. R. APP. PROC. 41, stayed its mandate until May 13, 1996, to permit the filing and disposition of a petition for certiorari. Appendix D. On April 23, 1996, the Fifth Circuit released two opinions, joined by a total of seven of the Court of Appeals' seventeen active judges (one of whom had recused himself), dissenting from the Court's failure to grant rehearing en banc. Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was filed on March 18, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. III
United States Constitution, amendment XIV
United States Constitution, amendment XI
Title VI of the Civil Rights Act of 1964,
42 U.S.C. § 2000d-7(a)(1)
42 U.S.C. § 1981
42 U.S.C. § 1983
These provisions are printed in Appendix F.

STATEMENT OF THE CASE

Proceedings Below

Respondents are four white applicants denied admission to the 1992 entering class at The University of Texas School of Law (the "Law School"). This action was filed in the United States District Court for the Western District of Texas. Respondents alleged that petitioners administered a racially discriminatory admissions program at the Law School, in violation of the Fourteenth Amendment to the United States Constitution; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981 and 1983. But for the Eleventh Amendment, the district court would have had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Petitioners moved for summary judgment on the ground, inter alia, that the Eleventh Amendment precluded this action against the State of Texas, its subdivisions, and officers acting in their official capacities. The district court denied that motion in an unpublished opinion dated October 28, 1993. R. 588-605.

After an eight-day bench trial in May 1994, the district court declared invalid the Law School's 1992 admissions procedure insofar as it employed a separate subcommittee for evaluating minority applicants. App. at B58-59. The court held this aspect of the 1992 procedure constitutionally infirm because it was not narrowly tailored to meet the State's compelling interests in seeking the educational benefits that flow from having a diverse student body and in redressing the continuing effects of discriminatory practices by the educational hierarchy of Texas. The district court held that it did not need to decide the constitutionality of a second feature of the 1992 procedure — the use of different presumptive denial scores for minority and nonminority candidates — because "none of the plaintiffs in this lawsuit was affected directly by this aspect of the 1992 procedure." *Id.* at B52 n.71. The State did not appeal the district court's ruling with respect to the 1992 policy, having abandoned that policy in 1994 in favor of one that treated race as simply a factor in the

individualized consideration and comparison of applicants to the Law School.

In crafting a remedy, the district court awarded respondents nominal damages only, because the State had shown "that legitimate, nondiscriminatory grounds exist for the Law School's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process." App. at B65. The court explained that 109 *nonminority* residents with numerical scores *lower* than Hopwood's were offered admission, and that sixty-seven nonminority residents with numerical scores lower than the other three plaintiffs were admitted, leading to the inference that weaknesses in respondents' applications, completely apart from their numerical scores, had triggered the Law School's decision not to admit them. *Id.* at B63-64.[1] In fact, the court observed that "it appears that the majority of applicants, both minority and nonminority, made considerable effort to inform the admissions committee of their special qualifications through extensive answers to the questions on the application form or through personal statements," and "[m]ost files contained one, if not several, letters of recommendation." *Id.* at B64. Respondents' files were notably bare. "In fact, of all the applications the Court reviewed, Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance, despite her relatively high numbers." *Id.*

The court declined to impose prospective injunctive relief with respect to the Law School's admissions policy because the Law School had adopted a new admissions policy during the litigation that "appears to remedy the defects the Court has found in the 1992 procedure," App. at B67, and because "neither a plaintiff denied admission under the new system nor evidence of the practical application of the new procedure is before this Court." *Id.* Under the new policy, the Law School does not use a separate minority subcommittee or different presumptive admission or

[1] Hopwood's score was the highest of any of the respondents.

denial scores for minority and nonminority applicants. *Id.* at B67 n.87. Each candidate is given fully individualized treatment on his or her own merits; race is considered, along with myriad other matters, such as socio-economic status, employment history, extra-curricular activities as an undergraduate, and other factors that make up a person's life experiences and affect what the person can contribute to the educational dialogue, both inside class and out. Although the Law School attempts to meet the targets (established by the Office for Civil Rights of the U.S. Department of Education) of ten percent Mexican American students and five percent Black students in an entering class, these targets are purely aspirational.[2]

The district court ordered that respondents be permitted to reapply under the new policy without being charged an application fee. App. at B67-68. But the court denied attorney's fees to respondents, on the ground that they had "failed to prove they would have been offered admission under a constitutional procedure" and "the *de minimis* nature of the relief the plaintiffs received is insufficient to justify an award of attorney's fees." *Hopwood v. State of Texas*, No. A-92-CA-563, mem. op. at 2, 4 (Nov. 14, 1994).

The court of appeals for the Fifth Circuit reversed, holding broadly that "the law school may not use race as a factor in law school admissions." App. at A3. With respect to the State's interest in enriching the educational experience of all its law students by encouraging the admission of, among others, Blacks and Mexican Americans, the court of appeals held that "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of a number of factors, is unconstitutional. . . . [T]he use of race *per se* is proscribed . . . ." *Id.* at A27. The Fifth Circuit opined that the consideration of race to promote diversity "is no more rational

[2] The district court, reviewing the statistics and evaluating the credibility of Admissions Committee members, found that the Law School's targets even in the 1992 admissions process were not rigid quotas, but "are aspirations only, subject to the quality of the pool of applicants." App. at B24.

on its own terms than would be choices based upon the physical size or blood type of applicants." *Id.* at A26.

With respect to remedying the present effects of *de jure* discrimination in Texas public education, the court held that the Law School was the *only* "relevant . . . past discriminator." App. at A40. "As a result, past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions." *Id.* at A45.

The court of appeals ruled that the district court erred in requiring the plaintiffs to prove that they had been injured by the Law School admissions procedures in place in 1992. Instead, the court held that "once discrimination is proved, the defendant bears the burden of proving no damage." *Id.* at A49 n.53. Accordingly, the court remanded to the district court the task of calculating compensatory damages.

The court of appeals also issued a series of "judicial instruction[s]" to the Law School, commanding it not to consider race as a factor in the admissions process "for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school." *Id.* at A55.

Judge Wiener, specially concurring, "respectfully disagree[d] with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school." *Id.* at A64. He nonetheless concluded that the 1992 Law School admissions process was not narrowly tailored to this interest. Judge Wiener also expressed reservations about the scope of relief issued by the court, warning that the majority had "inappropriate[ly]" issued "a de facto injunction" against respondents. *Id.* at A73. He cautioned that the plaintiffs had challenged "only the admissions process employed by the law school in 1992 -- not the admissions process that was in place and employed in 1995, not the admissions process that is being

employed in 1996, and not the admissions process to be applied in any future years." *Id.* at A75.

On April 4, 1996, the court of appeals denied rehearing en banc and announced that a dissent from the denial of rehearing would be released. Appendix C. On April 19, 1996, the court of appeals granted petitioners a 28-day stay pending the filing and disposition of this petition for writ of certiorari. In light of "the magnitude of the case" and "the importance of the issue," the court determined that "there is a reasonable chance that four Justices will vote to grant certiorari." The court also held that petitioners had met their burden of demonstrating irreparable injury in the absence of a stay.

On April 23, 1996, the court of appeals released two opinions dissenting from the Fifth Circuit's failure to grant en banc rehearing. Chief Judge Politz, joined by six other judges, filed a dissent warning that the panel's opinion "will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation." App. at E3. The Chief Judge described the court's decision as "a text book example of judicial activism" and "a frontal assault on contrary Supreme Court precedent." *Id.* "[T]he panel charted a path into terra incognita. Judicial restraint was the first casualty; it proved to be too burdensome. The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule *Bakke*." *Id.* at E7:

> By tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling *Bakke*. . . . The syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell's diversity

> conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of *Bakke*.

App. at E3, 7.

Judge Stewart filed a separate dissent from the Court of Appeals' failure to grant rehearing en banc, in order "to underscore the [court's] lack of historical perspective and sensitivity." App. at E9. Judge Stewart observed that the University of Texas School of Law was the same institution whose admissions policies were at issue in *Sweatt v. Painter*, 339 U.S. 629 (1950). He also noted that, in holding that the Law School had violated the Equal Protection Clause by excluding Heman Sweatt, this Court explicitly adhered to the " 'principle of deciding constitutional questions only in the context of the particular case before the Court,' drawing its decision 'as narrowly as possible.' " *Id.* (quoting 339 U.S. at 631). Judge Stewart criticized the Fifth Circuit majority for disregarding that guiding principle here, calling its failure to grant rehearing en banc a "travesty." *Id.* at E10.

Statement of Facts

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994); *id.* at 915 (King, J., dissenting). The district court confirmed this history in extensive factual findings that the court of appeals did not disturb. App. at B3-10.

In 1977, the District Court for the District of Columbia ordered the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (HEW) (now the Department of Education or DOE) to investigate discrimination in Texas' system of higher education. App. at B6-8; D296. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.mexican), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), *dism'd sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C.

Cir. 1990). Following a two-year investigation, OCR found in 1980 that Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

As a remedy, Texas agreed to adopt the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan).[3] OCR required that the Texas Plan include a commitment to "seek to achieve proportions of Blacks and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs." App. at B9 n.6; D238a at 5.

In 1983, just eight years before respondents applied to the Law School, Texas agreed, under threat of federal action, to formulate an acceptable plan to desegregate its higher education system, including the Law School. But in January 1994, the Department of Education notified Governor Richards that OCR was still overseeing Texas' desegregation efforts and would review the Texas system in light of *United States v. Fordice*, 505 U.S. 717 (1992). App. at B10. DOE has yet to determine that Texas' higher education system has come into compliance with Title VI and the Fourteenth Amendment. *Id.*

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[3] The initial version of the Texas plan included a general commitment to equal educational opportunity and student body desegregation for both Blacks and Hispanic students. App. at B8.; D237. In 1982, then Assistant Secretary of Education Clarence Thomas informed then Governor of Texas, William Clements, that the Texas Plan was deficient because the numeric goals for Blacks and Hispanic enrollment in graduate and professional programs were insufficient to enroll these minorities in proportion to their representation among graduates of the state's undergraduate institutions. App. at B8; D284. OCR recommended, among other measures, that each Texas professional school reevaluate its admissions criteria and "admit Blacks and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." App. at B9; D220.

In 1983, as a higher education desegregation plan was still being formulated, respondents Elliott and Rogers were students at the University of Texas. P153; P171.[4] Respondent Carvell was attending Texas public schools. P151. As the district court found, during the 1980s most Texas students lived in school districts whose public schools the federal courts and the United States Department of Justice had determined were still unconstitutionally segregated. App. at B46; D434. Over seventy percent of Blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans. 19 Tr. 43; D378B. Many school districts were found to practice official discrimination against Mexican-American as well as against Black students. App. at B4.[5] On the eve of trial, which fell on the fortieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), federal and private desegregation lawsuits were still pending against over forty Texas school districts. App. at B4; D457.

The district court found that Texas residents who applied for admission to the Law School in fall 1992 would have spent most, if not all, of their pre-college education in a school system

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[4] Hopwood was attending community college in California. P145. Rogers attended the University of Texas intermittently from 1982 until 1985, when he flunked out. He was first placed on scholastic probation effective spring semester 1983. P171.

[5] In 1983, the Court of Appeals for the Fifth Circuit found that Ector County "not only continued to fail to meet its duty to dismantle its dual school system, but actually increased the segregation in its schools of both Blacks and Mexican Americans" and that its "violation of the Constitution was not only clear but egregious." *United States v. Crucial*, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983). That same year the court concluded that Dallas public schools not only were still segregated, but had "opposed any student . . . desegregation, no matter how feasible or how minimal." *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983). Fort Worth still was not unitary. *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983). And Houston had recently been declared unitary, but only because demographic and other changes made effective desegregation infeasible. See, *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218 (5th Cir. 1983).

suffering the effects of unconstitutional segregation. App. at B46. The court found that official discrimination had "handicapped the educational achievement of many minorities." *Id.* Because the State of Texas required that eighty-five percent of the Law School's 1992 entering class be Texas residents, the court found that inferior educational opportunity particularly affected the Law School's current pool of qualified resident minority applicants. *Id.* at B46, B23-24.

The district court further found that the pool of qualified resident minority applicants was artificially constricted not only by Texas' unconstitutional public school system, but also by the reputation of the University and the Law School as "white" institutions with an environment hostile to minorities. App. at B45. The court found that, despite extensive recruiting efforts, the Law School's legacy of discrimination has hindered efforts to attract qualified minority students. *Id.*

The district court also made extensive findings regarding the importance of diversity in institutions of higher learning. The district court found, and the court of appeals did not question, that grade point averages and LSAT scores do not "adequately reflect the qualifications and characteristics a law school should consider in developing a diverse student body, which provides substantial educational benefit for all members of a law school class." App. at B25. In fact, the ABA and American Association of Law Schools each requires commitment to diversity in the student body as a prerequisite for membership or accreditation. 18 Tr. 26-28; D387; D389; D391; D395. The district court reached its conclusion only after considering extensive testimony from deans of law schools across the country, from current and former law students, and from law professors.

REASONS FOR GRANTING THE WRIT

1. **This Court should correct the court of appeals' misperception that *Bakke* is no longer the law and should reaffirm that educational diversity remains a compelling interest that justifies individualized consideration of race, among other factors, in higher education admissions decisions.**

The two-judge majority held that it was unconstitutional for the Law School even to *consider* the race of individual applicants "for the purpose of obtaining a diverse student body," in flat violation of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).[6] The majority opinion maintained that, "in significant part," Justice Powell's opinion "was joined by no other justice," App. at A19; that "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of the majority of the Court in *Bakke* or any other case," App. at A23; and that "Justice Powell's view in *Bakke* is not binding precedent." *Id.*

But the court of appeals ignored the holding of five Justices, who joined in Part V-C of Justice Powell's opinion, that it was not impermissible for the University of California to consider race as a factor in making admissions decisions:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Bakke, 438 U.S. at 320 (opinion of the Court per Powell, J.); *id.* at 328 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (joining in Part V-C of Justice Powell's opinion).

Exercise of this Court's certiorari jurisdiction would be amply warranted by a lower court's determination, under any circumstances, that a holding by this Court is no longer good law. *Bakke's* landmark status, and the paramount national interest in establishing, definitively, whether lower courts remain bound to follow it, represent further compelling reasons for this Court to review the decision below. For the last two decades, institutions of higher education have relied on *Bakke* to include race among the characteristics considered in composing student bodies that are not only bright, but diverse, to make education and the dialogue that advances it more effective and relevant to the society that graduates will enter. Longstanding and widespread reliance on *Bakke* counsel against its overruling, *see Planned Parenthood v. Casey*, 505 U.S. 833, 861-69 (1992), and particularly against permitting the lower courts simply to discard it.

Indeed, the Fifth Circuit itself recognized the important need for this Court's review and was able to declare *Bakke's* death only on the basis of concurring and dissenting opinions by the members of this Court and academic commentary.[7] In fact, however, the

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[6] Heeding this Court's admonition to the Fifth Circuit in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), Judge Weiner objected that "if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement." App. at A66 (Wiener, J., specially concurring).

[7] App. at A17-A33 (rejecting *Bakke* on the basis of five citations to Supreme Court majority opinions, four cites to plurality opinions, eleven cites to concurring opinions, three cites to dissenting opinions, eight cites to secondary authorities, and one cite to a lower court decision). Both the majority opinion and the concurrence in the Fifth Circuit stressed the urgent need for further guidance from this Court on the central issues in this case. *See, e.g., id.* at A17 n.18 (noting that *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), "the Supreme Court's most recent opinion on racial preferences — does not directly address the application of the strict scrutiny test"); *id.* at A34 n.39

(continued...)

Fifth Circuit's report of *Bakke's* demise was premature. The compelling interest in promoting educational diversity was recognized long before *Bakke*[8] and has been recognized even by those who reject diversity as a compelling interest in other contexts. Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest") and *id.* at 288 n. (noting the difference between providing role models and "the very different goal of racial diversity among the faculty") with *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J. dissenting) (disagreeing with extending the interest in diversity to the award of broadcast licenses).

Diversity is an especially compelling interest in legal education. No other discipline deals so fundamentally with the ordering of human relationships in our society, including racial and ethnic minorities who have been subjected to discrimination:

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[7] (...continued)
("Unfortunately, the precise scope of allowable state action is of somewhat undefined contours."); *id.* at A69 ("Until further clarification issues from the Supreme Court defining 'compelling interest' (or telling us how to know one when we see one), I perceive no 'compelling' reason to rush in where the Supreme Court fears — or at least declines — to tread.") (Wiener, J., specially concurring).

[8] *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (one of "the four essential freedoms" of a university, necessary "to provide that atmosphere which is most conducive to speculation, experiment, and creation" is "to determine for itself on academic grounds . . . who may be admitted to study") (citations omitted); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements").

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts.

Sweatt v. Painter, 339 U.S. 629, 634 (1950); *see also Wygant*, 476 U.S. at 314-15 (Stevens, J., dissenting) (endorsing diversity rationale). The First Amendment dimension of educational policy choices, by State as well as private higher educational institutions, adds to the compelling nature of the diversity interest. *See Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (noting that "academic freedom" has "long . . . been viewed as a special concern of the First Amendment").

Whatever the status of *Bakke*, the issue should be decided by this Court, so that the same rule applies across the country. The question is so fundamental as to warrant resolution on a nationwide basis. The Law School, for its part, is now severely handicapped in competing with, say, Harvard, Stanford, or Michigan to attract top students and faculty, because it can no longer ensure a truly diverse student body. Minority students in Texas, Louisiana, and Mississippi may be given special consideration by colleges and universities on the east and west coasts, but not in their home states. This imbalance is as ironic as it is intolerable, given the long history of official discrimination in the education of minorities in these Gulf Coast states. *See, e.g.*, App. at B3-10; *United States v. Fordice*, 505 U.S. 717, 721-25 (1992); *United States v. Louisiana*, 692 F. Supp. 642, 644-46 (E.D. La. 1988).

2. **This Court should clarify what State education officials may consider as a "strong basis in the evidence" to conclude that individualized consideration of race is necessary to remedy the present effects of the State's own past discrimination in education.**

The district court chronicled Texas' history of official discrimination in the education of Blacks and Mexican Americans at all levels of the State system. App. at B3-10. The court carefully assessed the impact of this undisputed discrimination on the Law School, particularly in view of the state legislative mandate that eighty-five percent of the Law School's 1992 entering class (eighty percent today) be Texas residents. *Id* at B23-24 and n.33. The court found the ultimate effect stark and severe: in the absence of some attention to race, the 1992 entering class at the Law School would have included *at most* a handful of Blacks and Mexican Americans. These figures, chilling as they are, are overly optimistic, given the Law School's own history. "[T]he record in this case demonstrates that, without affirmative action, the perception of the law school as a 'white' institution would be exacerbated, which would compound the difficulties of attracting top minority students." *Id.* at B48.

Rejecting petitioners' remedial purpose, the court of appeals held that remedying the ongoing effects even of *de jure* discrimination can *never* be a compelling interest unless the only past discrimination that the remedy is designed to overcome is discrimination previously practiced by the governmental actor that installed and administered the remedy — in this case, the Law School itself. The justification for remedial action by the Law School thus cannot be augmented by findings of official discrimination by the State of Texas in primary and secondary education or in state higher education generally. "The Supreme Court . . . has limited the remedial interest to the harm wrought by a specific governmental unit." App. at A38 n.43.

In fact, this Court has never so severely restrained a state's ability to remedy the present effects of pervasive past discrimination in its own public education system. In *Richmond v.*

J.A. Croson Co., 488 U.S. 469 (1989), Justice O'Connor, joined by the Chief Justice and Justice White, squarely *rejected* the suggestion that a city was required to "limit any race-based remedial efforts to eradicating the effects of *its own* prior discrimination." *Id.* at 486 (emphasis added). Instead, the Justices took the broader view that a state or subdivision "has the authority to eradicate [even] the effects of *private* discrimination within its own legislative jurisdiction," *i.e.*, "within local commerce under its jurisdiction." *Id.* at 491-92 (emphasis added). "Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.* at 492.[9]

The State of Texas has been no mere "passive participant" in the past exclusion of Blacks and Mexican Americans from equal opportunity in public education. Even the court of appeals acknowledged that "Texas state actors have discriminated against some minorities in public schools" and that "lingering effects of such discrimination is [*sic*] not 'societal,' if that term is meant to exclude all state action." App. at A39. The court nevertheless concluded that recognizing any remedial interest in this case would allow "generalized assertions" of past discrimination, based on "amorphous claim[s]" and even "sheer speculation," to justify remedial efforts with "no logical stopping point" aimed at redressing societal discrimination. *Id.* at A36-37. This conclusion is refuted by the district court's extensive fact findings

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[9] *See also Johnson v. Transportation Agency*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring in the judgment) (gender may be used as a " 'plus' factor" in affirmative action plan on the basis of statistical imbalance in work force, even in the absence of a finding of actual discrimination); *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979) (recognizing that discrimination at one level of the job market may affect the qualified pool at another level); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (*per curiam*) (upholding Social Security benefit formula that generated higher payments for retired female wage-earners than for similarly situated men, in order to remedy prior wage discrimination in job markets).

demonstrating the close nexus between Texas' discrimination and the pool of residents from which the Law School was required to draw eighty-five percent of its students. *See, e.g., id.* at B46. ("many public schools in Texas continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s, the decades in which the majority of 1992 law school applicants attended primary and secondary schools.").

The court of appeals' reasoning conflicts with the decisions of other circuits recognizing that the extensive factual findings of a district court, especially when coupled with determinations like those by the Office for Civil Rights of the Department of Education and the district court in the *Adams* litigation, provide ample predicate for a race-conscious remedial program.[10] The Fifth Circuit's decision in this case also conflicts with *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), which upheld the consideration of race in admissions in a pre-professional program at the University of Tennessee.[11]

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[10] In *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), the court held:

> [T]he issue of whether the findings of past discrimination made by the District of Columbia District Court and HEW were adequate to justify a race-conscious remedy is not even close. Findings of previous statutory violations of title VI by a district court and OCR justify the use of some type of race-conscious remedy by a state to serve its constitutionally permissible objective of remedying past discrimination.
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> 654 F.2d at 509.

[11] The Sixth Circuit held:

> Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted, they ordinarily must have been students for sixteen years. . . .
>
> The consent decree in this case does not seek to remedy some amorphous "societal" wrong. It is directed solely at the continuing

Even though the State of Texas is the lead defendant in this case and the fountainhead of Texas' past *de jure* discrimination at all levels of public education,[12] the court of appeals held that, for the State to be considered the relevant governmental actor, "the State of Texas, through its *legislature*, would have to find that past discrimination has present effects . . . ." App. at A39 (emphasis added). In fact, the State of Texas, acting through its *governor*, effectively made such findings in agreeing to the higher education remedial program implemented in the Texas plans. *See* App. at B8. More fundamentally, the court of appeals' holding offended principles of federalism and state sovereignty insofar as it held that the State of Texas is not free to structure its system of governance for public education such that the governor, the boards of regents, and other state officials have some degree of flexibility in deciding for themselves that the lingering present effects on the Law School of *de jure* racial discrimination and segregation practiced largely at lower levels of the State's educational hierarchy are serious enough to require a race-conscious remedy in the Law School's own admissions policies. "'Congress need [not] make particularized findings in order to legislate.'" *United States v. Lopez*, 115 S.Ct. 1624, 1631 (1995) (citation omitted). Demanding that a State do so — and that it speak expressly and exclusively through its legislature — is unduly intrusive on the State's freedom, under Art. IV, § 4 (the Republican Form of Government

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> effects of past practices that adversely affected black[s] . . . as they moved through the public school systems and the higher education system of the state.
>
> *Id.* at 809-10.

[12] Until 1969 the Texas Constitution provided for the maintenance of "separate schools for the white and colored children." TEX. CONST. art. VII, § 7 (1876, repealed 1969). It was this fundamental law of the State of Texas, not the Law School's admissions requirements, that barred Heman Sweatt. *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App. — Austin 1948, writ ref'd), *rev'd*, 339 U.S. 629 (1950).

Clause) and the Tenth Amendment, to structure its decisionmaking authority as it sees fit.

In *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), this Court emphasized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 2117; *see also id.* at 2114 (distinguishing between a "No Trespassing" sign and a "welcome mat"). The record of this case fully demonstrates the Law School's remedial justification for considering race in its admissions decisions. This Court's review is amply warranted.

3. **This Court should clarify whether admissions officers in states having practiced *de jure* segregation may, consistent with *United States v. Fordice*, take race into account to ameliorate the present segregative effects of seemingly "race-neutral" admission standards.**

This is not just an affirmative action case; it is a desegregation case. Until the court of appeals' opinion, Texas higher education institutions, including the Law School, continued to operate under a series of desegregation plans originally mandated and monitored by OCR.

States have an especially compelling interest in remedying the effects of past discrimination in their own education systems. *Fordice*, 505 U.S. at 727-28; *see Croson*, 488 U.S. at 524 (Scalia, J., concurring) (distinguishing school desegregation cases from employment set-asides); *Hammon v. Barry*, 813 F.2d 412, 421 n.18 (D.C. Cir. 1987) (Starr, J.) (distinguishing employment set-asides from "the unique and sensitive area of education" and "the government's fundamental interest in education" that may "support the use of racial considerations"), *cert. denied*, 486 U.S. 1036 (1988). Indeed, states that operated officially segregated systems of higher education have a broad affirmative duty under both the Fourteenth Amendment and Title VI to dismantle those systems. *Fordice*, 505 U.S. at 727-28. That duty is not satisfied merely by

adopting race-neutral policies. Rather, the state must take affirmative steps to ameliorate practices and policies that perpetuate the dual system. *Id.* at 728. That constitutional duty may require a state either to eliminate, or to counteract and minimize to the extent possible, strict reliance on test scores that effectively segregate white and minority students. *Id.* at 737-38; *id.* at 744 (O'Connor, J., concurring).

Without consideration of race, the Law School would come perilously close to this Court's warning in *Fordice*. As the district court found:

> [T]he ultimate effect of abandoning affirmative action at the law school would be to redirect minorities to the historically separate state law school at Texas Southern University, thereby resegregating the law school.

App. at B47. TSU, which was created to avoid integrating The University of Texas and the Law School (and is still called "The House That Sweatt Built"), today enrolls over half of all minority law students in Texas. Its student body is nearly seventy-five percent minorities. The evidence was undisputed that if Texas is compelled to abandon any consideration of race at its state law schools, it will return to a starkly dual system of legal education. Few minorities would attend the historically white law schools, while seventy-seven percent of minority law students in Texas would attend TSU, whose student body would be eighty-five percent Blacks and Mexican Americans. 12 Tr. 44-45; D452; D453.

4. **This Court should settle whether, in view of *Seminole Tribe of Florida*, a federal court may entertain suit against a State without its consent under Title VI of the Civil Rights Act of 1964.**

Respondents brought suit under 42 U.S.C. §§ 1981 and 1983, and under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. In the district court, the State raised an Eleventh Amendment defense in its motion for summary judgment.[13] Although the district court's decision to deny both injunctive relief and compensatory damages made that jurisdictional objection less salient, it was error of the first constitutional magnitude for the court of appeals to proceed as though the Eleventh Amendment limit on federal court jurisdiction was "simply not before [it]." App. at A52 n.56. To the contrary, the court reversed the trial court's refusal to award compensatory damages and remanded with instructions that respondents were presumptively entitled to damages against the State defendants. *Id.* at A51.

As this Court squarely held in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 (1996), the Eleventh Amendment is a bar to the exercise of subject matter jurisdiction by the federal courts in suits brought by citizens of a State against that State. *See Hans v. Louisiana*, 134 U.S. 1 (1890). The court of appeals had no subject-matter jurisdiction to entertain an action against Texas and its officials in clear derogation of the protections of traditional sovereign immunity contained in the Eleventh Amendment.[14]

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[13] *See* Memorandum in Support of Defendants' Motion for Summary Judgment on the Issue of Standing, Aug. 13, 1993, at 28-33.

[14] Respondents' inclusion of additional questions presented, such as those going to the availability of damages and prospective relief, should in no way be construed as conceding the State's amenability to suit in the first instance.

Respondents' claims for damages are predicated solely on Title VI,[15] which this Court has already determined is a classic Spending Clause statute.[16] In light of *Seminole Tribe*, it is plain that Congress lacks constitutional authority simply to *abrogate* the State's Eleventh Amendment immunity pursuant to Article I, whether through mandatory legislation enacted under the Commerce Clause or through mandatory legislation enacted under the Spending Clause. *See id.*, 116 S.Ct. at 1126 (no "principled distinction" may be drawn between various Article I powers). The Spending Clause -- even more plainly than the Commerce Clause and in stark contrast to the Fourteenth Amendment's Section 5, which was "adopted well after the adoption of the Eleventh Amendment," *id.* at 1127 -- is not "a grant of authority to the Federal Government at the expense of the States." *Id.* at 1126. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 597 (1937)(Spending Clause, while permitting States to contract "with Congress if the essence of their statehood is maintained without impairment," does not thereby reduce state authority, for "[e]ven sovereigns may contract without derogating from their sovereignty").

State amenability to suit could be drawn only from Congress's 1986 amendment of Title VI to provide, in 42 U.S.C. § 2000d-7(a)(1), that a "State shall not be immune under the

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[15] It is established beyond challenge that § 1981 and § 1983 will not support an action seeking to override a State's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 340 (1979); *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989)("State is not a 'person' within the meaning of § 1983").

[16] *See Guardians Ass'n v. Civil Service Comm.*, 463 U.S. 582, 599 (1983)(White, J., joined by Rehnquist, J.)(quoting Sen. Humphrey and other proponents of the Act); *accord id.* at 636-38, 640 n.10 (Stevens, J., joined by Brennan and Blacksmun, JJ., dissenting)(five Justices indicated that Title VI was enacted solely pursuant to the Spending Clause); *see also United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979)(Title VI enacted solely "to assure federal funds would not be used in an improper manner").

Eleventh Amendment . . . from suit in Federal court for a violation of . . . Title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." In enacting that provision, Congress sought by legislative dictate to override this Court's holding in *Guardians Ass'n, supra,* that limited Title VI remedies to prospective injunctive relief for unintentional violations of the Act. 463 U.S. at 602.

This assertion of federal legislative power to abrogate sovereign immunity cannot survive *Seminole Tribe*. This Court has now ruled that the provisions of Article I of the Constitution — necessarily including the Spending Clause — give Congress no power unilaterally to overcome the Eleventh Amendment: "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S.Ct. at 1131-32. Plainly, under this analysis, Title VI, which operates "not [as] a regulatory measure, but an exercise [under the Spending Clause] of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed,'" *Guardians Ass'n*, 463 U.S. at 599, is incapable of abrogating the Eleventh Amendment immunity of the States. The inescapable conclusion is that, when Congress sought in 1986 unilaterally to override state sovereign immunity, it was putting its power under the Spending Clause of Article I to a use that this Court has now definitively held impermissible.[17]

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[17] Nor is it even arguable that Title VI put the State of Texas on clear notice that, by allowing the Law School to accept Title VI funds, the State was somehow waiving its Eleventh Amendment immunity. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1980) (State must "voluntarily and knowingly accept" terms of waiver).

5. **This Court should settle whether *Carey v. Piphus* still requires plaintiffs to bear the ultimate burden of proving concrete injury before they may be awarded compensatory damages.**

The court of appeals recognized the "well-established rule . . . that in order to collect money damages, plaintiffs must prove that they have been injured." *Carey v. Piphus*, 435 U.S. 247,254-57 (1978). App. at A49. Nevertheless, the court held that, because respondents demonstrated a constitutional violation, under *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977), the burden shifted to petitioners to prove that respondents "would not have gained admittance to the law school under a race-blind system." *Id.* at A51. In so holding, the court of appeals recognized a split among the circuits on what *Mt. Healthy* means in racial preference cases, *id.* at A50 n.54.[18] It then proceeded to err in applying *Mt. Healthy*. This Court should settle whether *Mt. Healthy* relieves plaintiffs of the burden imposed by *Carey* to prove that the constitutional violation they claim caused the injury for which they seek compensation.

In *Carey*, this Court held that the common law of torts governs the award of compensatory damages in a § 1983 action. Thus, plaintiffs must prove not only that their constitutional rights were violated, but also that the violation caused the injury for which they seek compensation. 435 U.S. at 254-65. Absent proof

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[18] *Henson v. University of Ark.*, 519 F.2d 576, 577-78 (8th Cir. 1975) (per curiam) (placing burden of persuasion on white applicant to show affirmative action program prevented her admission) and *Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318, 1345 (W.D.N.C. 1979) (holding that plaintiff in non-class action bears burden of proving damages) *with Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir. 1977) (*dictum*) (citing *Bakke* and *Mt. Healthy*, but finding no causation, as evidence showed that plaintiff would not have been admitted regardless of affirmation action), and *Heit v. Bugbee*, 494 F. Supp. 66, 66-67 (E.D. Mich. 1980) (adopting *Bakke* and *Mt. Healthy* reasoning *in toto* for firefighter's reverse discrimination claims), and *United States v. McDonald*, 553 F. Supp. 1003, 1006 (S.D. Tex. 1983) (*dictum*) (same for discriminatory criminal prosecution).

of concrete damages, only nominal damages may be awarded. *Id.* at 266-67.

The district court therefore correctly held that, "[b]ecause the plaintiffs have failed to establish that they would have been admitted under a constitutional system, they are not entitled to [compensatory] damages. Further, had the plaintiffs been entitled to damages, none of them established monetary damages as required under the law . . . ." App. at B69. Nothing in the trial or appellate record shows otherwise. A plaintiff showing a constitutional violation in the *process* applied to that plaintiff can "recover compensatory damages only if he prove[s] actual injury caused by the denial of his constitutional rights." *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 307 (1986).

The court of appeals erred in holding that *Mt. Healthy* and *Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977), placed on the State the burden to demonstrate plaintiffs' lack of injury once plaintiffs had shown a violation of the Constitution. To the contrary, in *Mt. Healthy*, this Court held only that, once a plaintiff proves that an impermissible consideration was a "substantial factor" in causing the plaintiff concrete injury (such as the loss of a job), the burden then shifts to the defendant to show that it would have reached the same decision in the absence of the constitutional violation. 429 U.S. at 287. Here, the consideration of race by the Law School in its admission decisions was *not* a "substantial factor" in the respondents' failure to gain admission.[19] The district court considered evidence that forty-two nonminority residents with statistical scores higher than or equal to respondents' were *denied* admission, and 151 nonminority residents with scores lower than or equal to respondents' were *offered* admission. P139. Accordingly, the burden never shifted to petitioners to show by a preponderance of the evidence that they would have reached the same decision on

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[19] Indeed, as the district court found, none of the respondents had proven that he or she would probably have been admitted even under "a strictly race-blind process." App. at B65 n.85.

respondents' applications in the absence of a consideration of race. *Mt. Healthy*, 429 U.S. at 287.

Indeed, the court of appeals' decision illustrates why *Mt. Healthy* should not be used as the court of appeals used it in cases involving race-conscious affirmative action. For the circuit court's decision has placed respondents in a better position than they would have occupied had the Law School never adopted an affirmative action plan at all, the very result *Mt. Healthy* was concerned to avoid. *See*, 429 U.S. at 285. The court of appeals has in effect *presumed* that respondents are entitled to admission simply because the Law School considered race in its admissions decisions, despite evidence of "non-race based weaknesses in [their] applications." App. at B62; D-338.

The mischief this error has created is momentous, even in the instant case. The court of appeals has now opened the courthouse doors to literally hundreds of frustrated white applicants, the vast majority of whom would not have been admitted even under a race-blind policy — all of them demanding substantial damages and/or instant admission to the Law School. The threat is not hypothetical.[20] The precedential implications for other cases are sweeping.

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[20] *See* Complaint at ¶ 21, *Malooly v. State of Texas et al.*, No. A 96CA 229 SS (W.D. Tex. Apr. 10, 1996) (class action for damages "on behalf of all white and non-preferred minority applicants to the Law School's 1994 entering class who were denied admission . . . ."); *see* Janet Elliott & Gordon Hunter, *Buying Time After Hopwood*, TEXAS LAWYER, March 25, 1996, at 1, 16 ("Plaintiffs' attorney Terrell Smith says the panel's shifting of the burden of proof to the law school is the key to the whole case and exposes the university to hundreds of other reverse discrimination suits.").

6. This Court should clarify the Article III limits on the power of a federal court to issue prospective relief.

A final respect in which the court of appeals' judgment warrants this Court's review arises from the Fifth Circuit's decision to award prospective relief, in the form of thinly-veiled judicial "directives" to the University of Texas, regarding the admissions policy for 1995-96 and beyond — a policy which was not before the court of appeals. The district court properly declined to issue such relief, and the Fifth Circuit's decision to award it raises grave questions under the "case" or "controversy" requirement of Article III.

Under *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), and *Lujan v. Defenders of Wildlife Fed'n*, 504 U.S. 555, 560 (1992), there is no Article III case or controversy with respect to prospective relief here. For the aspect of the 1992 program invalidated by the district court has long since been discontinued and will not be reinstated. And, as to the *current* admissions policy, the first point to note is that the record is barren of support for the speculation that plaintiffs will reapply under it or be affected by it in any way.[21] Since make-whole relief would be available, if warranted, to each individual plaintiff in the form of an order of admission, there is no standing to seek prospective relief against the admissions policy as a whole. In order to claim the latter, plaintiffs would have to assert the rights of other, nonspecific potential parties who might be adversely affected by that policy in the future. This type of claim falls outside the case or controversy requirements of Article III.

A second and equally decisive Article III objection to prospective relief in this case is that, even if plaintiffs had

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[21] This case is thus readily distinguishable from *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), where this Court held that it was "very likely" that the company challenging the affirmative action policy at issue would in fact bid on a future contract under that policy, *id.* at 2105, and from *Northeastern Florida General Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993), where the company challenging a set-aside was "able and ready to bid on contracts" under a policy that maintained such a set-aside.

demonstrated a high likelihood that they would indeed reapply to the Law School, the record contains far too little information about the current admissions policy — the only policy that could affect them prospectively — to evaluate its concrete effect on their prospects. The record discloses what the new policy does *not* do: it does not use separate committees or statistical benchmarks for minorities. App. at B67 n.87. The new policy permits race to be considered only on an individualized basis, as one of many factors needed to produce diversity, and the percentage goals set by the Texas Plan for Blacks and Mexican Americans are purely aspirational.

The only "injury" respondents could suffer under the admissions program the Fifth Circuit halted — even assuming that they would reapply, which the record emphatically does *not* establish — would involve the individualized consideration of race as one of many factors. But mere *exposure* to such consideration of one's race, apart from any *effect* such consideration might have on one's concrete situation, would be the kind of diffuse, unparticularized "harm" that this Court has held does not suffice for purposes of Article III. *See, e.g., United States v. Hays*, 115 S.Ct. 2431, 2435-36 (1995).

There was accordingly no justification for the Fifth Circuit to address the constitutionality, in this prospective context, of the 1996 admissions process, or to issue elaborate "directives" to the Law School and other institutions, when the plaintiffs had not begun to satisfy the prerequisites for such intrusive equitable relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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